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IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S MOTION AND BRIEF TO RECALL AND AMEND THE JUDGMENT

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of Counsel

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RESPONDENT'S MOTION TO RECALL AND AMEND THE JUDGMENT

Respondent moves to recall the copy of this Court's judgment certified December 3, 1957, issued to the United States District Court for the Eastern District of New York, and to amend said judgment to provide for remand of the cause to the United States Court of Appeals for the Second Circuit for determination of two points expressly left undecided by the Court of Appeals and not decided by this Court, or, alternatively, to recall said judgment and for leave to argue to this Court the merits of said undecided points.

Dated: New York, New York
December 12, 1957

EUGENE UNDERWOOD
Counsel for Respondent

WILLIAM M. KIMBALL
H. BARTON WILLIAMS
of Counsel

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RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO RECALL AND AMEND THE JUDGMENT

Statement

Respondent argued three points to the Court of Appeals: (a) Whether the District Court erred in refusing to charge that petitioner was not entitled to any recovery if he chose to use a known unsafe passageway when there was a known safe alternate passage: (b) whether the District Court had power to consider respondent's motion for a new trial on the ground of excessiveness; (c) if so, whether, in considering that motion, the District Court had power to determine whether the jury made proper allowance for contributory negligence.

In its opinion, the Court of Appeals stated:

> "We believe that the court below, in refusing to give the requested charge, committed reversible error, and we are therefore remanding this case for a new trial. In view of this disposition, *it is unnecessary to discuss the appellant's second contention.*" (246 F. 2d 557, 559) (Italics added)

In its *per curiam* opinion of October 21, 1957, this Court did not advert to the two points, expressly left undecided by the Court of Appeals, but reversed on the only point decided by that Court, saying:

> "The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed and the case is remanded. We hold that the trial court did not commit reversible error in refusing to charge respondent's request No. 12. The petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law. The jury was properly instructed that the petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts."

By letter to the Clerk of this Court dated October 28, 1957, respondent's counsel inquired whether the judgment would order remand to the Court of Appeals for determination of the two points expressly left undecided by that Court and not decided by this Court. On October 29, 1957, the Deputy Clerk replied that:

> "* * * judgment in the above case will state that the case is remanded to the United States Court of Appeals for the Second Circuit."

Accordingly, respondent's petition for rehearing, which was filed on November 12, 1957, did not seek clarification or modification of this Court's opinion so as to expressly provide for remand to the Court of Appeals. The petition

or rehearing was denied on November 25, 1957, and a few days later the Court issued certified copies of its judgment remanding the cause to the District Court.

Respondent has obtained an order of the District Court staying petitioner from making this Court's judgment a judgment of that Court until December 31, 1957, when respondent will be heard on its District Court motion for a stay pending determination of this motion.

If the motion to this Court is denied, petitioner will issue execution on the District Court judgment and respondent will never have its day in an appellate court on two questions, timely raised, each of which respondent strongly believes require reversal of the District Court judgment.

ARGUMENT

1. The Relief is properly sought by this motion.

In *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183, the majority granted an identical motion after respondent's petition for rehearing had been denied. A minority dissented on the ground that the question should have been raised by another petition for rehearing which could not be granted because Rule 58(4) bars such consecutive petitions (*Id.*, pp. 186, 188). However, unlike this respondent, the respondent in *Cahill* had urged in its petition for rehearing that the cause should be remanded to the Court of Appeals (*Id.*, pp. 184, 185). Furthermore, the respondent in *Cahill* did not, prior to its petition for rehearing, receive the Clerk's assurance that the cause would be remanded to the Court of Appeals, as was done here. Even the *Cahill* minority conceded that:

> "There are strong arguments for allowing a second petition for rehearing where a rigid application of this rule *would cause manifest injustice.* Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556-559." (*Id.*, p. 188) (Italics added)

2. The motion should be granted

Although the statement in respondent's brief in opposition to the petition for certiorari noted, that the Court of Appeals had not passed upon two of the questions presented to it, neither petitioner nor respondent argued the merits of those questions to this Court and this Court's opinion makes no mention of those questions. Normally, the Court of Appeals has primary responsibility to decide those questions, *Manufacturers' Co.* v. *McKey*, 294 U. S. 442, 453, and they are of such nature as to make it particularly appropriate that the Court of Appeals be permitted to initially decide them, *Bates* v. *U. S.*, 323 U. S. 15, 17. Accordingly, the cause should be remanded to the Court of Appeals as was done in *Cahill* and *Bates* (*supra*) and in such cases as *Union Trust Co., et al.* v. *Eastern Airlines, Inc.*, 350 U. S. 962; *Boudoin* v. *Lykes Brothers S.S. Co., Inc.*, 350 U. S. 811; *U. S.* v. *Beach*, 324 U. S. 193, 196; *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 126; *Schriber Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 61.

Alternatively, if the Court should be disposed to decide those questions, respondent asks leave to brief and argue their merits, based on decisions such as those by the Court of Appeals for the Second Circuit in *Comiskey* v. *Pennsylvania Railroad Co.*, 228 F. 2d 687 and *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598, holding that it is the duty of the District Court to condition a denial of a motion for a new trial upon a remittitur where the verdict is excessive, even though there is sufficient evidence to support a verdict in some amount for plaintiff, and that in passing upon such motion, the District Court has the power to consider whether the jury made proper allowance for contributory negligence.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that its motion be granted.

Dated: New York, New York
December 12, 1957

EUGENE UNDERWOOD
Counsel for Respondent

WILLIAM M. KIMBALL
H. BARTON WILLIAMS
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